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Adding (or Reaffirming) a Temporal Element to the Miranda Warning "You Have the Right to an Attorney"

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ADDING (OR REAFFIRMING) A TEMPORAL ELEMENT TO THE *MIRANDA* WARNING "YOU HAVE THE RIGHT TO AN ATTORNEY"

I. INTRODUCTION

Imagine a suspect sitting in a police station interrogation room mentally preparing himself for questioning. Prior to questioning, a police officer reads the suspect the standard *Miranda* warnings off of a card, which include the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[1] While the right to remain silent and the warning that the suspect's statements can be used against him are easily understood, the declaration that the defendant has the right to the presence of an attorney is not. At best, this warning is ambiguous, as the right to an attorney could apply before, during, or after interrogation; at worst, this warning is misleading. The *Miranda* warnings are intended to protect a suspect's Fifth Amendment right against compelled self-incrimination;[2] however, the vagueness of the "right to the presence of an attorney" combined with the intensity of the interrogation often render the suspect's Fifth Amendment privilege illusory.

The United States Supreme Court has determined the number and specificity of warnings that a law enforcement official is required to give to a suspect by balancing the competing interests of law enforcement and suspects. On the one hand, custodial interrogation provides law enforcement officials with a valuable opportunity to obtain confessions and inculpatory statements, which help to secure convictions. On the other hand, a suspect must be made aware of his rights so that he can invoke his Fifth Amendment privilege against self-incrimination if he chooses to. In *Miranda v. Arizona*, the Supreme Court considered these competing interests and declared that the Fifth Amendment includes

1. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

2. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

the right to have counsel present during interrogation and that a suspect must be made aware of this right.[3]

Currently, however, the circuit courts are divided on whether the Fifth Amendment and *Miranda* require *Miranda* warnings to include an express reference to the right to have an attorney present *during interrogation* in order for statements to be admissible in the prosecution's case-in-chief. Several circuits hold that the standard warning, which warns the suspect only of the general right to an attorney, is constitutionally adequate, while other circuits require an explicit reference to the right to consult with an attorney *during interrogation.*[4] At the outset, it is worth noting that this Comment in no way seeks to minimize the importance of confessions and statements made by a suspect during interrogation; such statements and confessions are a vital part of the criminal justice system. Instead, this Comment advocates that the *Miranda* warnings should be clear, comprehendible, and should alert the suspect of his constitutionally protected rights. The legitimacy of the criminal justice system rests, in part, on the process of interrogation being conducted in a civilized manner. As one scholar commented, "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[5]

This Comment contends that both the Fifth Amendment and *Miranda* dictate that a suspect must be explicitly made aware of the right to have an attorney present during interrogation. Part II discusses the guidance that *Miranda* and its progeny provide with respect to the right to have counsel present during interrogation. Part III gives an overview of the circuit split and points out that several circuits have conflicting precedent on the issue. Part IV argues that the specific warning is necessary to adequately protect a suspect's Fifth Amendment right against compelled self-incrimination. Part V proposes a bright-line rule, which states that if the accused is not made aware of the right to have an attorney present during interrogation, all statements made will be inadmissible. This Part concludes that the Supreme Court and other courts should adopt this rule and require a temporal element as part of the right-to-an-attorney warning because it will benefit the police, the courts, and the suspects. This Part also asserts that if the Supreme

3. *See infra* Part II.A.

4. *See infra* Part III.A.

5. *Miranda*, 384 U.S. at 480 (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

Court does not adopt this rule, law enforcement officials should nonetheless alert suspects of their right to have an attorney present during interrogation to increase the likelihood of having confessions deemed admissible without fearing that more suspects will invoke their right to consult with an attorney.

II. SUPREME COURT CASES AND THE RIGHT TO AN ATTORNEY'S PRESENCE DURING INTERROGATION

In *Miranda v. Arizona*, the Supreme Court put procedural safeguards in place to protect an individual's Fifth Amendment right against compelled self-incrimination.[6] Since the Court handed down this landmark decision, *Miranda* has been on a turbulent rollercoaster ride in which it has seen its protections whittled down and then bolstered. The following Part provides a brief overview of the *Miranda* decision, focusing on the right to have an attorney present during interrogation, and then discusses the decisions that have affected this right.

A. Miranda v. Arizona*: The High Watermark*

The decision of *Miranda v. Arizona* established the high watermark of protections that law enforcement officials must provide to a suspect prior to custodial interrogation.[7] According to the Court, the protections are not only necessary to protect against the inherent evils of custodial interrogation, they are mandated by the Constitution.[8] The *Miranda* Court discussed various techniques used by police officers during interrogation that make interrogation an inherently coercive

6. *Miranda*, 384 U.S. at 444. Prior to *Miranda*, the Court used the Due Process Clause of the Fourteenth Amendment to guarantee procedural fairness in the interrogation process. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 236 (1940); Brown v. Mississippi, 297 U.S. 278, 286 (1936). In applying the Due Process Clause to custodial interrogations, the Court sought to ensure that all confessions were made voluntarily by looking to the "totality of the circumstances." Fikes v. Alabama, 352 U.S. 191, 197 (1957). The overarching question in each case was "whether a defendant's will was overborne [by interrogators] at the time he confessed." Reck v. Pate, 367 U.S. 433, 440 (1961). In 1964, two years before *Miranda*, the Court incorporated the Fifth Amendment right against compulsory self-incrimination into the Fourteenth Amendment, which prohibited the states from infringing upon this constitutional right. *Malloy*, 378 U.S. at 6. Incorporation of the Fifth Amendment set the stage for the Court to further expand the Fifth Amendment privilege.

7. Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1121 (2001).

8. *Miranda*, 384 U.S. at 456–58, 460; *see also* Dickerson v. United States, 530 U.S. 428, 439 n.4 (2000) (citing the constitutional references to the Fifth Amendment in *Miranda*).

situation,[9] and then declared that such practices are "at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."[10] Expounding upon this principle, the Court stated:

> [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.... [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[11]

While the Court recognized that statements and confessions obtained during interrogation are vital components of the American criminal justice system, the Court also recognized that suspects must be afforded certain constitutional protections so that their rights are not trampled upon.[12]

To protect a suspect's right to remain silent and right not to incriminate himself, the Court required two procedural safeguards: the warnings, which make the suspect aware of his rights, and a valid waiver of the rights.[13] The Court set forth a list of warnings that a suspect subjected to custodial interrogation[14] must be made aware of prior to any questioning, which are: "the right to remain silent, that anything [the suspect] says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[15] The Court did not go so far as to require a verbatim reading of these warnings, but stated that either this list of warnings or the "fully effective equivalent" is a prerequisite for admissibility of any statements

9. *Miranda*, 384 U.S. at 449–53. The various techniques include isolating the suspect so that he is deprived of every psychological advantage, treating the suspect's guilt as a fact, and inducing confessions through trickery. *Id.*

10. *Id.* at 457–58.

11. *Id.* at 460 (citing *Chambers*, 309 U.S. at 235–38) (internal citation omitted).

12. *Id.* at 478–79.

13. *Id.* at 479.

14. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

15. *Id.* at 479.

made by the suspect.[16] After the warnings are recited, the suspect must be given an opportunity to exercise his rights, and, if he chooses not to, he may then "voluntarily, knowingly, and intelligently" waive the rights and answer questions.[17] The *Miranda* Court held that unless interrogators comply with these safeguards, the evidence obtained from the interrogation cannot be used as evidence against the suspect.[18]

In another part of the opinion, the Court further expounded upon the Fifth Amendment right to an attorney and declared that a suspect has the right to have counsel present during custodial questioning.[19] The Court deemed the right to have an attorney present during interrogation "indispensable to the protection of the Fifth Amendment privilege. . . ."[20] Accordingly, the Court held:

> *[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . . [T]his warning is an absolute prerequisite to interrogation.* No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.[21]

Despite the Court's declaration that this warning is an "absolute prerequisite" to questioning, subsequent decisions of the Court have not strictly followed this language.

B. The Subsequent Fall and Rise of Miranda

A few years after *Miranda* was handed down, the Court began limiting the scope of the exclusionary remedy set forth in *Miranda* in situations where law enforcement officials failed to comply with the proper warnings.[22] In *Harris v. New York,* the Court held that

16. *Id.* at 476.
17. *Id.* at 444, 479.
18. *Id.*
19. *Id.* at 469.
20. *Id.*
21. *Id.* at 471–72 (emphasis added).
22. The *Miranda* Court stated that "unless and until [the] warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the suspect]." *Id.* at 479.

statements taken in violation of *Miranda* could be used to impeach a defendant if he took the stand, even though the statements could not be used in the prosecution's case-in-chief.[23] Similarly in *Michigan v. Tucker*, the Court held that the testimony of a witness was admissible even though the police learned the identity of the witness from a statement taken in violation of *Miranda*. Specifically, the police learned the identity of a witness during the defendant's custodial interrogation without advising the defendant that he was entitled to court appointed counsel.[24] Despite the clear *Miranda* violation, the Court did not require suppression of the witness's testimony because it reasoned that the police conduct did not infringe upon the defendant's constitutional privilege against compulsory self-incrimination.[25] In reaching this conclusion, Justice Rehnquist divorced the *Miranda* warnings from their constitutional underpinnings by stating that the warnings were not explicitly mandated by the Constitution, but were merely "prophylactic rules" developed to protect the right against compelled self-incrimination.[26] Moreover, the decision highlighted that the *Miranda* warnings "were not intended to create a 'constitutional straightjacket.'"[27] Both *Harris* and *Tucker* created significant incentives for the police to give inadequate *Miranda* warnings because statements obtained in violation of *Miranda* could still be used to dissuade a defendant from testifying at trial, and could be used to lead the officers to evidence that would be admissible in the prosecution's case-in-chief.[28]

A few years after *Tucker*, the Court reiterated that a suspect must be made aware of his right to have counsel present during interrogation. In *Fare v. Michael C.*, the Court stated: "The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning . . . of his right to have counsel, retained or appointed, present during interrogation."[29] While this passage demonstrates that the Court requires a suspect to be made aware of his right to have counsel present during interrogation, the holding in *Fare*

23. 401 U.S. 222, 226 (1971).

24 Michigan v. Tucker, 417 U.S. 433, 436 (1974). The interrogation occurred before the *Miranda* decision, but under *Johnson v. New Jersey*, 384 U.S. 719 (1966), *Miranda* was applicable. *Tucker*, 417 U.S. 435.

25. *Id.* at 446, 448–49.

26. *Id.* at 439, 444.

27. *Id.* at 444 (quoting *Miranda*, 384 U.S. at 436, 467).

28. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 111 (1998).

29. 442 U.S. 707, 717 (1979).

did not validate the importance of this right. *Fare* held that a juvenile's request to speak to his probation officer was not a per se invocation of his Fifth Amendment right to counsel.[30] Nonetheless, the Court recognized the clarity with which the *Miranda* Court spoke with regard to the right to have an attorney present during interrogation.

The Court reinforced the protections provided by *Miranda* and validated the significance of an attorney's presence during interrogation in *Edwards v. Arizona*.[31] In *Edwards*, the Court held that if a suspect invokes his right to have counsel present during interrogation, questioning must stop immediately and cannot resume until the suspect is provided counsel, or the suspect initiates communication with the police officers.[32] This holding elevated the constitutional status of the warning that the suspect has a right to have counsel present during interrogation, and demonstrated that the Court was willing to uphold and protect a suspect's Fifth Amendment right to counsel.

Shortly after the Court elevated the status of the right to have counsel present during interrogation, the Court trivialized the importance of the precise wording of the *Miranda* warnings. In *California v. Prysock*, the Court pointed out that it "has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. . . . *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."[33] The defendant in *Prysock* was told of his right to have counsel present before and during questioning, and of his right to have an attorney appointed if he could not afford one; however, the officer did not give the warnings in the exact order that is laid out in the *Miranda* opinion.[34] The Court of Appeals for the Fifth Appellate District of California suppressed the defendant's statements based on this error and ordered a new trial.[35] Reversing the state court decision, the Court held that the order in which the warnings were given was not of constitutional significance because the substance of the warnings was conveyed.[36]

30. *Id.* at 724.

31. 451 U.S. 477, 484–85 (1981).

32. *Id.* at 485. The Court clarified *Edwards* in *Minnick v. Mississippi*, 498 U.S. 146 (1990). In *Minnick*, the Court held that once a suspect requests counsel, law enforcement officials may not reinitiate interrogation without counsel present even if the suspect has already communicated with counsel. *Minncick*, 498 U.S. at 154.

33. 453 U.S. 355, 359 (1981) (per curium).

34. *Id.* at 356–57.

35. *Id.* at 358.

36. *Id.* at 361.

Although the deviation from the standard *Miranda* warnings in *Prysock* was fairly benign, this case set the stage for further erosion of the *Miranda* protections.

Within the five years following *Prysock*, the Court handed down several decisions that continued to chip away at the core of the *Miranda* warnings. First, in *New York v. Quarles*, the Court established a "public safety" exception to *Miranda*.[37] Under this exception, the police are free to forgo the warnings if doing so will help protect the public from danger.[38] Afraid this exception would lead the Court down a slippery slope that would result in numerous exceptions to the *Miranda* warnings, Justice Marshall commented in dissent:

> By finding on these facts justification for unconsented interrogation, the majority abandons the clear guidelines enunciated in *Miranda v. Arizona*, and condemns the American judiciary to a new era of *post hoc* inquiry into the propriety of custodial interrogations. . . . [T]he majority has abandoned the rule that brought 18 years of doctrinal tranquility to the field of custodial interrogations. As the majority candidly concedes . . . a public-safety exception destroys forever the clarity of *Miranda* for both law enforcement officers and members of the judiciary.[39]

Justice Marshall proved to be right, because after *Quarles*, the Court continued to legitimize police behavior that violated the letter and spirit of the *Miranda* opinion.

In *Oregon v. Elstad*,[40] for example, the Court declined to apply the "fruit of the poisonous tree" doctrine[41] to a confession made after proper *Miranda* warnings were given, even though the defendant made a previous statement without receiving any warnings.[42] According to the Court, the initial, unwarned statement, given in the defendant's living room, was made voluntarily and was unaccompanied by any coercion or

37. 467 U.S. 649, 655–56 (1984).

38. *Id.* at 656.

39. *Id.* at 674, 679 (Marshall, J., dissenting) (citations omitted).

40. 470 U.S. 298 (1985).

41. The "fruit of the poisonous tree" doctrine provides that evidence discovered through an illegal search or through other unconstitutional means will not be admissible in court. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

42. *Elstad*, 470 U.S. at 316–17.

other deceitful tactics.[43] In holding that the initial *Miranda* violation did not taint the subsequent confession, the Court emphasized again that the *Miranda* rules were prophylactic in nature, rather than constitutionally mandated.[44] In *Quarles* and *Elstad,* the Court eviscerated the core of the *Miranda* holding by "minimiz[ing] the cost of neglecting to warn suspects of their rights."[45]

The Court continued to whittle away at the *Miranda* protections in *Duckworth v. Eagan.*[46] The issue in *Duckworth* was whether *Miranda* warnings were constitutionally inadequate when the defendant was told the right to court-appointed counsel did not attach until he went to court.[47] The police officer told the defendant that he had the right to have counsel present before and during interrogation but that appointed counsel could only be provided "if and when you go to court."[48] These warnings essentially deprived the indigent defendant of his right to have counsel present before and during interrogation, yet the Court held the warnings to be adequate because they "touched all of the bases required by *Miranda.*"[49] It should be noted that while *Prysock* and *Duckworth* did not require a verbatim reading of the warnings as laid out in *Miranda,* both of the warnings given in these cases included the warning that the accused has the right to have counsel present during interrogation.[50]

Recently, the Court reaffirmed the constitutional status of the *Miranda* decision in *Dickerson v. United States.*[51] In an opinion written by Chief Justice Rehnquist, a longtime critic of *Miranda,*[52] the Court held that because *Miranda* announced a constitutional rule, it could not be overruled by an act of Congress.[53] Most importantly, the opinion

43. *Id.* at 300–01, 315.

44. *Id.* at 305, 309.

45. Steven D. Clymer, *Are Police Free to Disregard* Miranda, 112 YALE L.J. 447, 518 (2002) (referring to New York v. Quarles, 467 U.S. 649 (1984)).

46. 492 U.S. 195 (1989).

47. *Id.* at 200–01.

48. *Id.* at 198.

49. *Id.* at 200, 203.

50. *Id.* at 198; California v. Prysock, 453 U.S. 335, 356 (1981).

51. 530 U.S. 428 (2000). Prior to *Dickerson,* the constitutional underpinnings of *Miranda* had been seriously questioned. *See generally* Alfredo Garcia, *Is* Miranda *Dead, Was it Overruled, Or is it Irrelevant?,* 10 ST. THOMAS L. REV. 461 (1998) (explaining the many qualifications and exceptions to *Miranda*).

52. Justice Rehnquist wrote the majority opinions in *Michigan v. Tucker* and *Duckworth v. Eagan*; he also joined the majority opinions in *Fare v. Michael C.* and *Oregon v. Elstad.*

53. *Dickerson,* 530 U.S. at 444. The Act of Congress at issue was the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 3501. The relevant part of this

rebuked language from prior cases that indicated *Miranda* was merely a set of prophylactic rules,[54] and that it was not intended to create a "constitutional straightjacket."[55] *Dickerson* was the culmination of the Court's thirty-plus year struggle with its role in regulating police conduct in that it reaffirmed *Miranda's* constitutional status[56] and "[gave] it a permanent place in [the Court's] jurisprudence."[57]

Dickerson provided the Court with the momentum it needed to further bolster the *Miranda* protections.[58] In *Missouri v. Siebert*, the Court held that warnings given mid-interrogation, after the suspect gave an unwarned confession, were ineffective and the subsequently repeated confession was therefore inadmissible.[59] The interrogating police officer in this case followed a technique laid out in national police manuals, which instructed officers to withhold *Miranda* warnings until obtaining a confession.[60] After the suspect gave a confession, pursuant to the technique, the officer would then give the warnings and ask the suspect to repeat the information he had already told the officer.[61] The State argued the confession should be admitted into evidence because the technique complied with the "question-first strategy" that the Court approved in *Elstad*.[62] As stated above, *Elstad* held that an initial, inadvertent failure to administer the *Miranda* warnings did not taint a subsequent confession given after proper warnings were administered and a valid waiver was obtained.[63] The Court distinguished *Siebert* from

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bill provided that the admissibility of statements made by a suspect during interrogation depended on whether the statements were made voluntarily, rather than on whether the proper *Miranda* warnings were given. *Id.* Although this statute attempted to overrule *Miranda* and restore the voluntariness test, the Department of Justice refused to implement it, and therefore, the statute never achieved its intended effect. United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *overruled by* 530 U.S. 428 (2000).

54. *Dickerson*, 530 U.S. at 438.

55. *Id.* at 440 n.6.

56. *Id.* at 444; *see also* Yale Kamisar, *Foreword: From* Miranda *to § 3501 to* Dickerson *to . . .*, 99 MICH. L. REV. 879, 888–89 (2001); Weisselberg, *supra* note 7, at 1121.

57. *Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting).

58. *But see* United States v. Patane, 542 U.S. 630, 634 (2004) (holding, in a three Justice plurality decision, failure to give suspect *Miranda* warnings does not require suppression of physical fruits of suspect's unwarned but voluntary statements); Chavez v. Martinez, 538 U.S. 760 (2003) (holding officer's failure to read *Miranda* warnings to suspect prior to questioning did not violate suspect's constitutional rights, and thus could not be grounds for § 1983 action).

59. 542 U.S. 600, 604 (2004).

60. *Id.* at 604–05.

61. *Id.* at 606, 609.

62. *Id.* at 614.

63. Oregon v. Elstad, 470 U.S. 298, 309 (1985).

Elstad on the grounds that the technique used in *Siebert* intentionally deprived the suspect of his *Miranda* rights whereas the situation in *Elstad* was a "good-faith *Miranda* mistake."[64] The Court recognized that the State attempted to manipulate the *Elstad* holding and undermine the *Miranda* protections, and in the process, the Court upheld the core value of the *Miranda* decision—preventing police from obtaining coerced statements and confessions.

In the wake of *Dickerson* and *Siebert*, the constitutional safeguards from *Miranda* have been re-legitimized, setting the stage for the Court to resolve the circuit split regarding whether interrogators must warn a suspect of his right to have counsel present during interrogation.

III. CIRCUIT SPLIT

A. A Split of Authority

Although *Miranda* and its progeny indicate that a suspect subjected to custodial interrogation must be informed of his right to have counsel present *during interrogation*, not merely of the right to have an attorney, the circuits are split on whether this explicit warning is required. The Second,[65] Fourth,[66] Seventh,[67] and Eighth[68] Circuits hold *Miranda* warnings adequately protect a suspect's right against compelled self-incrimination without warning the suspect of his right to have counsel present during interrogation. In contrast, the Fifth,[69] Sixth,[70] Ninth,[71]

64. *Siebert*, 542 U.S. at 614–15.

65. United States v. Burns, 684 F.2d 1066, 1074–75 (2d Cir. 1982); United States v. Lamia, 429 F.2d 373, 375–77 (2d Cir. 1970); United States v. Cusumano, 429 F.2d 378, 380 (2d Cir. 1970); United States v. Vanterpool, 394 F.2d 697, 698–99 (2d Cir. 1968).

66. United States v. Frankson, 83 F.3d 79, 81–82 (4th Cir. 1996).

67. United States v. Arman, No. 04C6617, 2006 WL 293907, at *2–3 (N.D. Ill. Feb 2, 2006) (recognizing that the Seventh Circuit does not require a suspect to be explicitly warned of his right to have counsel present during interrogation); *see also* United States v. Adams, 484 F.2d 357, 361–62 (7th Cir. 1973); United States v. Fowler, 476 F.2d 1091, 1092–93 (7th Cir. 1973).

68. United States v. Caldwell, 954 F.2d 496, 503 (8th Cir. 1992); *see infra* notes 99–109 and accompanying text.

69. Sanchez v. Beto, 467 F.2d 513, 515 (5th Cir. 1972); Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968); Montoya v. United States, 392 F.2d 731, 735 (5th Cir. 1968); Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968); Chambers v. United States, 391 F.2d 455, 456 (5th Cir. 1968); *see infra* notes 85–98 and accompanying text.

70. United States v. Tillman, 963 F.2d 137, 141 (6th Cir. 1992).

71. United States v. Bland, 908 F.2d 471, 473–74 (9th Cir. 1990); United States v. Noti, 731 F.2d 610, 614–15 (9th Cir. 1984).

and Tenth[72] Circuits hold that *Miranda* requires the suspect to be explicitly warned that he has the right to have counsel present during interrogation.[73]

The source of the circuit split is the different variations of the warning for the Fifth Amendment right to counsel that the *Miranda* decision sets forth. When the Court is laying out the total package of warnings that must be given, the warning is phrased as the "right to the presence of an attorney."[74] Yet, when the Court is specifically discussing the importance of an attorney's presence during interrogation, the Court unequivocally states that the suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . [T]his warning is an absolute prerequisite to interrogation."[75]

Further complicating the issue is the unclear post-*Miranda* Supreme Court precedent. On the one hand, in *Fare v. Michael C.*, the Court stated in dicta, "The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning . . . of his right to have counsel, retained or appointed, present during interrogation."[76] Yet, on the other hand, in several cases, such as *Prysock* and *Duckworth*, the Court emphasized that there is not one set of certified or official warnings.[77] Whether a circuit requires an express reference to the right to consult with an attorney during interrogation often depends on which part of *Miranda* and which Supreme Court precedent the circuit relies on.

Not surprisingly, those circuits requiring the specific warning rely heavily on the *Miranda* passage that states "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during

72. United States v. Anthon, 648 F.2d 669, 673–74 (10th Cir. 1981); United States v. Oliver, 421 F.2d 1034, 1038 (10th Cir. 1970).

73. *See* Martin J. McMahon, Annotation, *Necessity That Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 A.L.R. FED. 123 (1986) (compiling cases).

74. Miranda v. Arizona, 384 U.S. 436, 444, 479 (1966).

75. *Id.* at 471.

76. Fare v. Michael C., 442 U.S. 707, 717 (1979).

77. Duckworth v. Eagan, 492 U.S. 195, 203 (1989); California v. Prysock, 453 U.S. 355, 359 (1981).

interrogation . . . ."[78] For example, the Ninth Circuit Court of Appeals in *United States v. Noti*, relying on this passage, declared "[t]he right to have counsel present during questioning is meaningful. Advisement of this right is not left to the option of the police; it is mandated by the Constitution."[79] Similarly, the Fifth Circuit held that advising the suspect that he could consult with an attorney "at anytime" did not comply with the above-cited directive from *Miranda*.[80]

Conversely, circuits holding that the general warning is sufficient rely heavily on language from Supreme Court precedent which states that no "talismanic incantation"[81] of the warnings is necessary and that the *Miranda* warnings do not require a "precise formulation."[82] Moreover, these circuits believe that the general warning implies the specific warning, and therefore, the explicit warning of the right to have counsel present during interrogation is unnecessary.[83] For example, in *United States v. Cusumano*, the Second Circuit Court of Appeals held that even though neither defendant was explicitly warned of his right to have an attorney present during interrogation, "such an inference [could] readily be drawn."[84]

B. Intra-Circuit Conflict

As laid out above, the circuits are split on whether a suspect must be warned of his right to have counsel present during an interrogation. Within two of these circuits, there are directly conflicting opinions, thus, making the law in these circuits unclear and drawing attention to the uncertainty of the law in this area.

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78. *See, e.g.*, United States v. Noti, 731 F.2d 610, 614 (9th Cir. 1984) (quoting Miranda v. Arizona, 384 U.S. 436, 471 (1966)); Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968) (same).

79. *Noti*, 731 F.2d at 615.

80. *Atwell*, 398 F.2d at 510 (citing *Miranda*, 384 U.S. at 471); *see also* Windsor v. United States, 389 F.2d 530, 532, 533 (5th Cir. 1968) (telling a suspect "he could speak to an attorney . . . before he said anything" was not the same as telling the suspect of his right to have counsel present during interrogation, and therefore, the warning was inadequate).

81. United States v. Frankson, 83 F.3d 79, 81 (4th Cir. 1996) (quoting California v. Prysock, 453 U.S. 355, 359 (1981)); United States v. Caldwell, 954 F.2d 496, 501–02 (8th Cir. 1992) (same).

82. *Frankson*, 83 F.3d at 81 (quoting *Prysock*, 453 U.S. at 361); *Caldwell*, 954 F.2d at 501 (quoting *Prysock*, 453 U.S. at 359).

83. *See Frankson*, 83 F.3d at 82 ("[The suspect's] right to an attorney began immediately and continued forward in time without qualification.").

84. 429 F.2d 378, 379 (2d Cir. 1970) ("[The agent warned defendants they were] entitled to an attorney to be present while they make any statements.").

The most recent case to shed light on this circuit split, *Bridgers v. Dretke*, came out of the Fifth Circuit Court of Appeals and created intra-circuit conflict.[85] Prior to *Bridgers*, the Fifth Circuit had held that a suspect must be explicitly warned of his right to have counsel present during interrogation.[86] In *Bridgers*, however, the defendant was read his *Miranda* warnings from a card issued by the Fort Lauderdale Police Department, which, among other warnings, stated, "You have the right to the presence of an attorney/lawyer prior to any questioning."[87] Both the warnings and the subsequent confession were tape-recorded.[88] The confession was admitted into evidence, over objection, and Bridgers was convicted of capital murder in a state jury trial and sentenced to death: the Texas Court of Criminal Appeals affirmed the conviction and sentence.[89] The state appellate court recognized that *Miranda* requires a suspect to be made aware of his right to have counsel present during interrogation, but held that the warnings given to Bridgers adequately conveyed this right to him, and therefore, complied with *Miranda*.[90]

Bridgers then appealed the decision to the United States Supreme Court but the Court denied certiorari; however, Justices Breyer, Stevens, and Souter issued a statement with the denial.[91] In the statement, the Justices observed, "the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element."[92]

Bridgers next petitioned for a writ of habeas corpus in the Eastern District of Texas, but was denied relief and appealed.[93] Because Bridgers sought habeas relief after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Fifth Circuit Court of Appeals, like the district court, reviewed the writ under a very deferential standard of review.[94] Under the deferential standard

85. 431 F.3d 853, 860 (5th Cir. 2005), *cert. denied*, 126 S.Ct. 2961 (2006).

86. Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968); Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968).

87. *Bridgers*, 431 F.3d at 856.

88. *Id.*

89. *Id.* at 856–57.

90. *Id.* at 857–58, 860 n.5.

91. Bridgers v. Texas, 532 U.S. 1034 (2001).

92. *Id.*

93. Bridgers v. Livingston, No. 100CV724, 2005 WL 3683735, at *1 (E.D. Tex. Mar. 30, 2005).

94. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal court cannot overturn a decision of a state court unless the state court's decision:

of review, the Fifth Circuit upheld the denial of writ on the grounds that the Texas court's holding was not "objectively unreasonable."[95]

Further complicating the Fifth Circuit's decision, the court stated in a footnote that its prior precedent holding that a suspect must be explicitly warned of the right to have counsel during custodial interrogation remained binding precedent.[96] According to the court, the prior precedent remained binding because it was subjected to a de novo review, while the *Bridgers* case was reviewed pursuant to AEDPA.[97] If this case leaves you confused, you are not alone; one commentator noted, "This decision is about as clear as mud."[98]

The precedent from the Eighth Circuit Court of Appeals is also about as clear as mud. In *United States v. Caldwell*, the Eighth Circuit upheld *Miranda* warnings that stated you have the "right to an attorney."[99] The court reviewed the warnings under the deferential plain-error doctrine, rather than de novo review because the defendant did not properly preserve the issue of the adequacy of the *Miranda* warnings for appeal.[100] Whether this standard of review dictated the outcome is not entirely clear. Nonetheless, the court stated that the warnings the detective gave to the defendant complied with *Miranda*, *Duckworth*, and *Prysock*, leading one to believe that the court probably would have upheld the warnings even under a de novo review.

In dissent, Chief Judge Lay blasted the majority opinion for overriding the law of the circuit without an en banc decision.[101] Chief Judge Lay argued that the Eighth Circuit, in *South Dakota v. Long*, had already settled the issue of whether a suspect must be explicitly warned

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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2000).

95. *Bridgers*, 431 F.3d at 860.

96. *Id.* at 860 n.6.

97. *Id.*

98. Pamela A. MacLean, *5th Circuit 'Miranda' Case Muddies the Waters*, NAT'L L.J., Jan. 19, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1137492308952 (quoting Karyl Krug, a federal habeas practitioner in Austin, Texas, and former Texas deputy attorney general).

99. 954 F.2d 496, 502 (8th Cir. 1992).

100. *Id.* at 500–01.

101. *Id.* at 510 (Lay, C.J., dissenting).

of his right to have counsel present during custodial interrogation in favor of requiring the warning.[102] In *Long*, a sheriff warned the defendant "he did not have to say anything and that he had a right to an attorney."[103] The *Long* court held that the "warnings [were] inadequate [because] the accused, although advised he had the right to an attorney, was not advised that 'he had the right to the presence of an attorney and that, if he could not afford one, a lawyer could be appointed to represent him *prior to any questioning*.'"[104] Chief Judge Lay quoted this passage and declared that the Eighth Circuit requires a suspect to be warned of the right to have counsel present during interrogation;[105] however, the majority in *Caldwell* did not believe *Long* settled the issue.[106]

The *Caldwell* majority, instead, relied on another Eighth Circuit decision, *Evans v. Swenson*, for the proposition that it has never required a suspect to be made explicitly aware of his right to have counsel present before and during questioning.[107] In *Evans*, the police officer warned the suspect, among other warnings, "You have a right to make a phone call and you also have a right to an attorney."[108] The *Evans* court held that this warning complied with the substance of *Miranda* because it suggested to the suspect his right to have counsel before and during questioning.[109]

Whether *Long* or *Evans* actually settled the issue of whether a suspect must be explicitly warned of his right to have an attorney present during interrogation is not clear, either from the cases themselves, or from the court's later interpretations of them. If *Caldwell* had been reviewed de novo would *Long*, instead of *Evans*, have been considered controlling? No one knows. What is clear, however, is that the intra-circuit conflicts in the Fifth and the Eighth circuits and the overall circuit split beg the Supreme Court to speak with clarity on this issue.

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102. *Id.* (citing South Dakota v. Long, 465 F.2d 65 (8th Cir. 1972)).

103. *Long*, 465 F.2d at 68. The court pointed out that the defendant was never advised of his right to have counsel appointed or that he had the right to remain silent. *Id.*

104. *Id.* at 70 (citing Smith v. Rhay, 419 F.2d 160, 163 (9th Cir. 1969)).

105. *Caldwell*, 954 F.2d at 510 (Lay, C.J. dissenting) (quoting *Long*, 465 F.2d at 70).

106. *Id.* at 503 n.10 (majority opinion).

107. *Id.* at 502 (citing Evans v. Swenson, 455 F.2d 291 (8th Cir. 1972)).

108. *Evans*, 455 F.2d at 295.

109. *Caldwell*, 954 F.2d at 502 (citing *Evans*, 455 F.2d at 295).

IV. THE NEED FOR THE EXTRA WARNING

A. The Importance of Counsel

The *Miranda* Court highlighted several important Fifth Amendment functions that are served by an attorney's presence during interrogation. First, the presence of an attorney "enable[s] the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process."[110] Second, the presence of an attorney ensures that the statements made are given voluntarily and are not the product of coercion.[111] Third, the presence of an attorney limits the possibility that the police will abuse their authority (and if they do abuse their authority, the attorney will be able to alert the court of the misconduct).[112] Essentially, an attorney ensures that a suspect's statements are made voluntarily, that a suspect has the ability to invoke his right to remain silent, and that the interrogation process is conducted in a way that complies with the Fifth Amendment privilege.[113]

The explicit warning that the suspect is entitled to have counsel present during interrogation is extremely important because counsel serves as the gatekeeper to a suspect's rights. As the Court stated in *Fare v. Michael C.*, "[T]he lawyer is the one person to whom society as a whole looks as the protector of the legal rights of [a] person in his dealings with the police and the courts."[114] A suspect will most likely have a difficult time protecting his right against compelled self-incrimination when interrogators are attempting to induce him to waive the privilege; so, having an attorney present to advocate for the suspect's rights will give the privilege substance and force. Take, for example, the right to remain silent; when a suspect is brought in for questioning and he is told that he has the right to remain silent, the suspect will have difficulty believing that he, in fact, has this right. As one commentator noted, "To remain silent in a police interview room in the face of determined questioning by an officer with legitimate authority to carry on this activity requires an abnormal exercise of

110. Miranda v. Arizona, 384 U.S. 436, 466 (1996).
111. *Id.*
112. *Id.* at 470.
113. *Id.* at 466.
114. 442 U.S. 707, 719 (1979).

will."[115] However, if the suspect has counsel present during interrogation, the right to remain silent now becomes a legitimate option. Although the same can be said of the right to the presence of an attorney—that the suspect will have a difficult time invoking the right—adding the words "during interrogation" to the warning at least helps to clarify the right and make the suspect aware of it.

Professor Mark Godsey argues that the role the *Miranda* Court envisioned for an attorney during interrogation has not been born out in practice and that the right-to-counsel warning should be dropped because it is superfluous.[116] He is not alone, as many commentators have observed that the practical effect of a suspect invoking his right to counsel is termination of the interrogation.[117] Law enforcement officers frequently terminate interrogation when a suspect invokes his right to counsel because they are aware that if an attorney is present, the attorney will probably advise his client to remain silent.[118] As a result, officers prefer to terminate an interview when a suspect invokes his right to counsel rather than go through the process of obtaining a lawyer for an indigent suspect or waiting for retained counsel to arrive.[119] While the commentators are probably correct to assert that the invocation of counsel often results in termination of questioning, as this assertion is demonstrated through empirical research,[120] this does not prove Professor Godsey's argument that the suspect need not be made aware of the right to have an attorney present.[121]

The point of the *Miranda* warnings is to protect a suspect's Fifth Amendment right against being forced to give incriminating statements. If the suspect invokes his right to counsel and the interrogation terminates, the suspect is not being forced to incriminate himself and the warnings are serving their purpose. Moreover, the warning of the right to have counsel present during interrogation provides the suspect

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115. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 59 (1992) (quoting 2 BARRIE IRVING, ROYAL COMM'N ON CRIM. PROC., *forward* to POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE 153 (1980)).

116. Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 797–99, 813–14 (2006).

117. *Id.* at 797–98 nn.74–75 (compiling sources).

118. *Id.*

119. *Id.* at 797–99.

120. *Id.* at 798 n.75 (citing Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276–78 (1996)).

121. It should be noted that Professor Godsey's proposal is not intended to limit a suspect's rights, but rather is intended to incorporate and reflect current police practices and Supreme Court precedent. *Id.* at 783.

another avenue to invoke his privilege;[122] invoking the right to remain silent may seem too difficult to do, but invoking the right to an attorney may be less intimidating.[123] Further, a suspect garners extra protections when he invokes his right to counsel. In accordance with *Edwards v. Arizona*, when a suspect requests counsel, questioning cannot resume until counsel is provided or the suspect initiates communication.[124]

Professor Godsey recognizes that some benefits may be derived from the warning, but argues that the "coercion-lessening benefits" are "minimal or speculative at best."[125] Nonetheless, the actual benefits that are derived from the warning tip the scales in favor of its inclusion. Moreover, even if the benefits are speculative, overturning forty years of case law by eliminating a warning that is a *Miranda* fixture is a very drastic and unnecessary measure. In sum, even if counsel's presence during interrogation is not playing out in practice as the *Miranda* Court envisioned, the warning for this right is still protecting the suspect's Fifth Amendment privilege, and therefore is important and necessary.

Along this line of reasoning, each *Miranda* warning does not necessarily have independent significance in and of itself, but rather the package of warnings is intended to convey to the suspect that he does not have to talk if he does not desire to. The attorney's presence is only a means to an end, not an end in itself like the Sixth Amendment right to counsel.[126] In other words, an attorney's presence during interrogation gives the Fifth Amendment right against compulsory self-incrimination meaning by safeguarding the suspect's right to remain silent. For example, during interrogation, an attorney may advise his client to selectively answer questions, or advise his client not to answer any questions. Therefore, the *Miranda* warnings are not a "bundle of sticks" that can be separated; rather, the warnings are inseparable and

122. *Id.* at 798–99.

123. *See* GUDJONSSON, *supra* note 115, at 59.

124. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981); *see* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (holding that when a suspect requests counsel, law enforcement officials cannot reinitiate interrogation without counsel present even if suspect has already communicated with counsel); Godsey, *supra* note 116, at 806.

125. Godsey, *supra* note 116, at 806.

126. The Sixth Amendment right to counsel is explicitly stated in the text of the Constitution. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). Whereas the Fifth Amendment right to counsel is implied from the text, and is necessary to protect the textual right against compelled self-incrimination. *See also* Godsey, *supra* note 116, at 798 (stating that the Fifth Amendment right to counsel and the Sixth Amendment right to counsel differ in substance and policy).

all the warnings are necessary to ensure the suspect's Fifth Amendment privilege is protected.

It should be noted that the right to have counsel present *prior* to interrogation is also an important right; however, it is not as important as the right to have counsel present during interrogation. A suspect is not subjected to coercive tactics before interrogation because prior to questioning the suspect is not called upon to give statements or to make a confession. It is true that the suspect could voluntarily offer information prior to interrogation that would hurt his case, but the *Miranda* warnings do not protect a suspect who is willing to talk; they protect a suspect from being coerced to give incriminating information. From a practical standpoint, adding "prior to interrogation" to the warning "you have the right to the presence of an attorney during interrogation" would not make any difference if the suspect invokes his right to have counsel during interrogation because once the attorney arrives, he can consult with his client prior to questioning if he so chooses. A Fifth Amendment violation caused by a suspect giving an unwarned statement cannot be remedied by telling the suspect of his right to speak to an attorney prior to interrogation, as there will still be opportunities for the suspect to make a statement before the attorney arrives at the station. Rather, this potential violation is remedied by immediately advising the suspect of his rights upon the first encounter with police and continually making him aware of these rights. While having a lawyer present to prepare a suspect before interrogation can undoubtedly help to protect a suspect's rights, the coercion that the *Miranda* warnings seek to prevent is the coercion that occurs during the interrogation, not before.

B. Extra Warning Necessary in Light of Davis v. United States

Advisement of the right to have counsel present during interrogation is necessary so that a suspect can make a clear and unequivocal request for counsel, as required by *Davis v. United States*.[127] As an initial matter, the Court held in *Edwards v. Arizona* that when a suspect expresses to his interrogators that he does not wish to continue questioning without counsel present, the interrogation must cease immediately.[128] The suspect, however, cannot show hesitation or be indecisive when making the request for counsel; in order for a suspect to invoke his right to

127. 512 U.S. 452 (1994).

128. 451 U.S. 477, 484 (1981).

counsel, he must make a clear and unambiguous request.[129] The Supreme Court articulated the standard for invoking the right to counsel prior to custodial interrogation in *Davis* as follows:

> [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . [The suspect] must articulate his desire to have counsel present sufficiently clearly [so] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.[130]

If the request does not meet this level of clarity, the questioning will continue without counsel.[131]

The standard for invoking the right to counsel can be very difficult for a suspect to meet for several reasons. First, suspects who are minorities, powerless in society, or poor tend to use indirect modes of speech.[132] Indirect modes of speech are often used to avoid conflict and include adding such words as "I think," "I guess," "maybe," and "perhaps" to an affirmative phrase.[133] For example, a suspect may say, "I think I want a lawyer."[134] The use of the extra words by the speaker conveys that he or she is uncertain about the statement being made, even if he or she is not uncertain.[135] This false conveyance of uncertainty is problematic because, under *Davis*, law enforcement officials do not have to stop the interrogation when a suspect attempts to invoke his right to counsel using an ambiguous or indirect mode of speech.[136] Moreover, minorities and the poor are arrested on a

129. *Davis*, 512 U.S. at 459.

130. *Id.* (citing McNeil v. Wisconsin, 501 U.S. 171, 178 (1991) and Edwards v. Arizona, 451 U.S. 477, 485 (1981)).

131. *Id.* at 462.

132. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 261, 263, 317 (1993).

133. *Id.* at 276, 318.

134. *See, e.g.*, State v. Jennings, 2002 WI 44, ¶ 9, 252 Wis. 2d 228, ¶ 9, 647 N.W.2d 142, ¶ 9 (stating that during interrogation, the defendant stated "I think maybe I need to talk to a lawyer"); *Davis*, 512 U.S. at 455 (stating that during interrogation, the defendant stated "Maybe I should talk to a lawyer").

135. *Davis*, 512 U.S. at 455.

136. *Id.*

disproportionate basis, and therefore, the *Davis* rule creates a strong bias against them.[137]

A second reason the *Davis* standard is difficult to meet is because if a suspect makes a request for counsel that the interrogators deem to be ambiguous, the interrogators can ask clarifying questions.[138] By asking clarifying questions, the police officers can use trickery and coercion to dissuade the suspect from invoking his right to counsel. For example, the officers may use clarifying questions to prompt the suspect to change his mind,[139] or they may ask questions and act as if they do not understand the request for counsel.[140] The following tape-recorded conversation that took place in *Alvarez v. Gomez* is illustrative of these tactics.

> [Detective(1)]: "Do you understand those rights?" (referring to *Miranda* rights)
> [Defendant]: "Yes."
> [Detective(1)]: "Okay. Do you wanna give up the right to remain silent? Mario [the defendant], you wanna talk to us about this incident?"
> [Defendant]: "*Can I get an attorney right now, man*?"
> [Detective(1)]: "Pardon me?"
> [Defendant]: "*You can have attorney right now*?"

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137. *See* BUREAU OF JUSTICE STATISTICS: SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 358, 360 (2003). Whites account for 70.7% of total arrests and comprise 80.7% of the total United States population, while Blacks account for 26.9% of the total amount of arrests and make up 12.7% of the total population. *Id.*; *see also* Bruce Western et al., *Economic Inequality and the Rise in U.S. Imprisonment* 11 (Russell Sage Found., Working Paper, 2004), *available at* http://www.russellsage.org/publications/workingpapers/ineqimprisonment/document ("[P]olice may surveil and arrest the poor more frequently than the affluent. Police partly focus their efforts in poor urban communities because more of daily life, and illegal activity, transpires in public space.") Minorities are more likely to live below the poverty line than whites. In 2003, the poverty rate for non-Hispanic Whites was 8.2% compared to 24.4% for Blacks, and 22.5% for Hispanics. U.S. Census Bureau News, http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html (last visited Apr. 7, 2007).

138. *Davis*, 512 U.S. at 461.

139. WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 93 (2001). The officers might also tell the suspect that he can help himself by cooperating. *See, e.g.*, United States v. Vera, 701 F.2d 1349, 1363–64 (11th Cir. 1983) (holding that the confession was voluntarily made when the agent told the suspect that he could help himself by cooperating).

140. Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 449 (1999).

> [Detective(1)]: "Ah, you can have one appointed for you, yes."
> [Defendant]: "*Well, like right now you got one*?"
> [Detective(1)]: "We don't have one here, no. There's not one present now."
> [Detective(2)]: "There will be one appointed to you at the arraignment, ah, whether you can afford one. If you can't one will be appointed to you by the court."
> [Defendant]: "All right."
> [Detective(1)]: (says something unintelligible)
> [Defendant]: "I'll—I'll talk to you guys."
> [Detective(1)]: "Okay. You wanna talk to us without a lawyer here, right?"
> [Defendant]: "Yeah."[141]

After being convicted in state court of first-degree murder and car theft, the defendant in *Alvarez* sought habeas relief to suppress his confession arguing that he invoked his right to counsel.[142] The district court denied relief, but the Ninth Circuit Court of Appeals held that the "thrice-repeated questions, when considered together, constituted an unequivocal request for an attorney," and granted relief.[143] Even though the court in this case ultimately held that the defendant invoked his right to have counsel, this passage demonstrates how law enforcement officials use clarifying questions to dissuade a defendant from invoking his right to counsel.

Lastly, making a clear and unambiguous request for counsel is very difficult to do when the warning is itself unclear and ambiguous. If the suspect is not made aware of when he can have an attorney, he will not realize that he is entitled to have an attorney present during interrogation, and any request for an attorney may seem ambiguous. The *Davis* threshold creates a double standard; the police, in some jurisdictions, are permitted to give an ambiguous warning—"you have

141. 185 F.3d 995, 996–97 (9th Cir. 1999) (emphasis added); *see also* Thompson v. Wainwright, 601 F.2d 768, 770 n.2 (5th Cir. 1979). After signing a valid waiver and indicating that he wanted to make a statement, the defendant told officers "he first wanted to tell his story to an attorney." *Thompson*, 601 F.2d at 769. Police officer testified to telling the defendant "if he waited and talked to an attorney, the first thing the attorney would tell him is not to say anything and that if he had anything that he thought we should know, that he should go ahead and tell us." *Id.* at 770 n.2.

142. *Alvarez*, 185 F.3d at 997.

143. *Id.* at 998.

the right to the presence of an attorney"—but the suspect is not entitled to counsel when he makes an ambiguous request. Based on the demanding standard for invoking counsel from *Davis*, a more precise warning for the right to have counsel is necessary.

C. The General Warning Is Ambiguous and Misleading

The warning that the suspect has the "right to the presence of counsel" does not adequately convey the specific right to have counsel present during interrogation. This is because a general warning for the right to have counsel present has no temporal element and could be construed as meaning sometime after questioning or during trial, as trial is the time many lay people associate with having an attorney. While a legally trained mind, or a person with a high level of sophistication might be able to imply the specific right to have counsel present during interrogation from the general warning, many suspects may not be able to make this leap in logic. This is because many criminal suspects do not possess a high level of sophistication, or even if a suspect has the sophistication to make this deduction, the police will most likely intimidate and confuse the suspect so that he is not thinking clearly.

The inherent ambiguity in a general warning is illustrated in a case from Florida where the adequacy of the *Miranda* warnings was at issue.[144] The suspect was warned, "You have the right to talk with a lawyer and have a lawyer present before any questioning."[145] After the defendant gave a confession in the case, an expert met with the defendant and questioned his understanding of the right to counsel.[146] Specifically, the expert asked the defendant when he believed he could have an attorney, to which the defendant responded, "only in the courtroom. You can't have one when you're questioned because the cops wouldn't want one. Why not? Because you might not say what they want you to say."[147] The expert concluded that the defendant did not understand his right to have a lawyer with him during interrogation.[148]

144. Roberts v. State, 874 So. 2d 1225 (Fla. Dist. Ct. App. 2004).

145. *Id.* at 1226.

146. *Id.*

147. *Id.* Similarly, one scholar has noted that "the warnings are given in a very routine, unconvincing fashion and suspects either do not believe, or refuse to believe . . . that having a lawyer will not hurt their case." Paul Marcus, *A Return to the "Bright-line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 110 (1993).

148. *Roberts*, 874 So. 2d at 1226.

Another example that illustrates the ambiguity of a general warning can be found in *Atwell v. United States*, where the defendant was told that he had the right to consult with an attorney "at anytime."[149] The court aptly recognized that "'[a]nytime' could be interpreted by an accused, in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or some time or event other than the moment the advice was given and the interrogation following."[150] These examples demonstrate that an ambiguous warning regarding the right to counsel, without more, may lead a suspect to believe the right to counsel does not attach until after interrogation.

Despite the inherent ambiguity in the general warning, the Fourth Circuit Court of Appeals held that such a warning was constitutionally adequate. In *United States v. Frankson*, the police sergeant told the defendant, "You have the right to an attorney. If you can't afford an attorney, the Government will get one for you."[151] At no point did the police sergeant tell the defendant that he had the right to have an attorney present before or during interrogation.[152] Nonetheless, the court held that the warning was sufficient because the "right to an attorney began immediately and continued forward in time without qualification."[153] In other words, the warning implicitly advised the defendant of his right to have counsel present during interrogation. As illustrated above, this logic is fatally flawed. While a lawyer or judge may be able to infer that the general warning continues forward in time, a suspect sitting in an isolated interrogation room most likely will not.

Sometimes the police will warn a suspect that he has the right to have counsel present prior to questioning, but will not warn the suspect of his right to have counsel present during questioning.[154] While this warning eliminates the ambiguity concern, it is extremely misleading. If the defendant is told he can have an attorney before questioning, this implies that there is no right to an attorney during questioning. This follows the logic of "if one, then not the other." Warning the suspect of his right to have counsel present before questioning is more dangerous than the general warning because it misleads the suspect and puts a limit on the right to have an attorney. If a suspect invokes his right to have

149. 398 F.2d 507, 510 (5th Cir. 1968).

150. *Id.*

151. 83 F.3d 79, 81 (4th Cir. 1996).

152. *Id.* at 82.

153. *Id.*

154. *See, e.g.*, United States v. Bland, 908 F.2d 471, 473–74 (9th Cir. 1990); United States v. Noti, 731 F.2d 610, 614 (9th Cir. 1984).

counsel present prior to questioning he would undoubtedly find out from the attorney of his right to have the attorney present during interrogation. However, the suspect may never invoke this right because he may think that he will not derive any benefit from an attorney's advice prior to interrogation, and will, therefore, decide to forfeit the right altogether.

D. Deception in the Interrogation Process

The police often use deception in order to induce a waiver of rights and to obtain a confession.[155] To begin, a suspect may waive his *Miranda* rights as long as the waiver is made voluntarily, knowingly, and intelligently.[156] For a waiver to be valid, it must be "made with a full awareness of . . . the nature of the right being abandoned."[157] Therefore, if the suspect is not made aware of his right to have counsel present during interrogation, the waiver is not made knowingly and intelligently, and the statements made will (or at least should) be inadmissible.

The *Miranda* warnings are often recited to a suspect in a way that seeks to induce a waiver without an actual contemplation of the rights.[158] For example, an interrogator may read the suspect his rights in a way that de-emphasizes their importance.[159] This technique is accomplished by reading the rights in a manner that portrays them as an "unimportant bureaucratic ritual," which implies that the warnings do not warrant the suspect's attention.[160] Another effective technique law enforcement

155. Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1168 (2001).

156. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Waiver cannot be presumed based on the suspect's silence after the warnings are given; rather, the Court requires some affirmative conduct indicating the suspect understands his rights and that he agrees to waive them. *See id.* at 475; *see also* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (stating explicit statement of waiver is not necessary because in some circumstances, "waiver can be clearly inferred from the actions and words of the person interrogated"). Notably, many police departments use a waiver form that requires the suspect to initial next to each of the warnings to indicate that he understands and waives each right. DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 37 (1993).

157. Moran v. Burbine, 475 U.S. 412, 421 (1986). *Moran* sets forth a two-pronged test to determine whether a waiver is valid. *Id.* The first prong requires that the waiver be made voluntarily and free from coercion. *Id.* The second prong, stated above, requires that the suspect be made fully aware of his rights. *Id.*

158. WHITE, *supra* note 139, at 78–91.

159. *Id.* at 79–80.

160. *Id.* at 79. One commentator has observed that "the warnings are given in a very routine, unconvincing fashion and suspects either do not believe, or refuse to believe . . . that having a lawyer will not hurt their case." Marcus, *supra* note 147, at 110. Another prominent

officials use is telling the suspect that by waiving his rights he will have a valuable opportunity to tell his version of the story.[161] Or, the interrogating officer may try to induce the suspect to waive his right to counsel even after the suspect has requested counsel by stopping the interrogation and leaving the suspect alone for a period of time until he changes his mind.[162] Because the use of these techniques will most likely not result in a constitutional violation (assuming the requisite warnings are given),[163] the need for a detailed warning for the right to counsel is heightened. If the precise warning is given, the suspect can at least contemplate the full extent of his rights.

Once officers have secured a waiver of rights, they will often use deceptive tactics in order to secure a confession.[164] Using deception to obtain confessions is a dangerous technique because it can lead to false confessions.[165] Deceptive tactics include the following: interrogators telling the suspect that non-existent eyewitnesses have identified him, telling the suspect that at-large accomplices have given statements against him, or showing the suspect a fabricated lab report linking him to the crime.[166] Having counsel present during interrogation helps to protect the suspect's Fifth Amendment right by limiting the use of these unethical techniques.

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scholar and former public defender stated that "the police are not an effective means of informing suspects both of the existence and extent of their privilege against self-incrimination and of their right to consult with counsel before they make any statements." Charles J. Ogletree, *Are Confessions Really Good For the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1827–28 (1987).

161. WHITE, *supra* note 139, at 81–87; *see also* Thompson v. Wainwright, 601 F.2d 768, 770 n.2 (5th Cir. 1979). Defendant told police officers that he wanted to talk to an attorney, and in response, the police officers told defendant that if he spoke to an attorney he would not be able to tell them his side of the story. *Thompson*, 601 F.2d at 770 n2.

162. WHITE, *supra* note 139, at 91.

163. *Id.* at 81. "[T]he government can establish a valid *Miranda* waiver by simply demonstrating that the suspect understood the meaning of the *Miranda* warnings; it need not show that he understood the consequences of waiving his rights." *Id.* (citing Colorado v. Spring, 479 U.S. 564 (1987) and Moran v. Burbine, 475 U.S. 412 (1986)).

164. Magid, *supra* note 155, at 1168 ("Virtually all interrogations—or at least virtually all successful interrogations—involve some deception.").

165. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1996). False confessions occur with "substantial frequency," and significantly contribute to wrongful convictions. *Id.*; WHITE, *supra* note 139, at 153, 160–79 (giving examples of police-induced false confessions). *But see* Magid, *supra* note 155, at 1197 (arguing deception is often necessary to obtain confessions and using deception leads to convictions, which benefits society).

166. WHITE, *supra* note 139, at 211.

V. BRIGHT-LINE RULE

The Supreme Court has consistently eschewed bright-line rules when it comes to the *Miranda* warnings.[167] In *Miranda*, as explained above, the Court set forth a list of warnings that must be given to a suspect subjected to custodial interrogation; however, the Court stated that the fully effective equivalent of the warnings would suffice.[168] This formula has worked well for all of the warnings, except for one—the right to have counsel present during interrogation. Telling the defendant that he has "the right to the presence of an attorney," or that he can have an attorney at "anytime" is not the functional equivalent of telling him that he has "the right to have an attorney present during interrogation." In contrast, telling a suspect that he "does not have to say anything" is the functional equivalent of telling him he has "the right to remain silent."[169] Similarly, telling a defendant that "anything he says can be used against him in court" is the fully effective equivalent of telling him "any statements he makes can be used as evidence against him." However, "the right to the presence of an attorney" is ambiguous and imprecise.[170]

The *Miranda* Court purposely did not make a rigid, inflexible rule requiring a verbatim reading of the warnings listed in the opinion for several reasons. First, the Court did not want criminals to escape conviction where the warnings given served the policies behind the warnings and protected the suspect from being forced to give statements.[171] Second, the Court did not want to drastically limit the effectiveness of police interrogation.[172] Lastly, the Court did not want to limit efforts of the states and Congress to "search for increasingly effective ways of protecting the rights of the individual."[173] In other words, the Court did not require strict adherence because it foresaw the states and Congress providing extra protections, not fewer.[174] None of these reasons stand in the way of the rule proposed in this Comment.

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167. *See supra* notes 33–45 and accompanying text.

168. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

169. *See* United States v. Lamia, 429 F.2d 373, 376 (2d Cir. 1970) (warning defendant that "he need not make any statement" was the equivalent of warning defendant of his "right to remain silent").

170. *See supra* Part IV.C.

171. *See Miranda*, 384 U.S. at 467, 481.

172. *See id.* at 481 ("[O]ur decision does not in any way preclude police from carrying out their traditional investigatory functions.").

173. *Id.* at 467.

174. *Id.*

Many proposals have been put forth in scholarly literature seeking to enhance the protections provided by the *Miranda* warnings or, at least, to restore the force they had when the Court announced the rights in 1966. These proposals include videotaping all custodial interrogations,[175] "a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney,"[176] and not permitting any deviation from the exact language of the *Miranda* warnings.[177] While all of these proposals are noble attempts to bring credibility to the interrogation process, such drastic measures are not only unnecessary, but their implementation would be burdensome, expensive, or both. The following proposal complies with the dictates of *Miranda* while also complying with subsequent cases that have stated a verbatim recital of the *Miranda* warnings is not required.

A. The Rule

This Comment proposes the following rule: Unless a suspect subject to custodial interrogation is explicitly informed of his right to have counsel present during interrogation prior to questioning, any statements made by the suspect will be inadmissible at trial in the prosecution's case-in-chief.[178] Stated differently, the right-to-an-attorney warning must include a temporal element alerting the suspect of his right to have counsel present during interrogation.

This rule does not require police officers to repeat verbatim that the suspect has the "right to have an attorney present during interrogation"; rather, what is important is the temporal element the rule adds to the right-to-the-presence-of-an-attorney warning. The warning can be

175. Ofshe & Leo, *supra* note 165, at 1120; *see also* Godsey, *supra* note 116, at 810. Several state high courts have required that custodial interrogation be recorded. *See* State v. Jerrell, 2005 WI 105, ¶ 3, 238 Wis. 2d 145, ¶ 3, 699 N.W.2d 110, ¶ 3 (requiring electronic recording of custodial interrogation of juveniles); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[A]ll custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985) (requiring electronic recording when custodial interrogation occurs in a "place of detention" and when feasible). Several states have required recording of custodial interrogations by statute. *See, e.g.*, WIS. STAT. § 968.073(2) (2005); 725 ILL. COMP. STAT. 5/103-2.1 (2003); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(1) (Vernon 2001).

176. Ogletree, *supra* note 160, at 1830.

177. Marcus, *supra* note 147, at 129.

178. Consistent with prior precedent, statements obtained in violation of this rule would still be admissible for impeachment purposes, *see* Harris v. New York, 401 U.S. 222, 224 (1971), and the "fruits" of the statements would be admissible as well, *see* Oregon v. Elstad, 470 U.S. 298, 305, 309 (1985); Michigan v. Tucker, 417 U.S. 433 (1974). *See supra* Part II.B.

adequately stated in many different ways, including: "You have the right to have an attorney present while you are being questioned,"[179] "You have the right to speak to an attorney beginning now and continuing through the duration of questioning," or "You have the right to have an attorney with you throughout the interrogation." Because different formulations of this warning exist, the rule does not contradict Supreme Court precedent that states the *Miranda* warnings are not a rigid formula.[180]

As an initial matter, implementing the proposed bright-line rule would not be a burden on law enforcement officials because it requires adding only two words to the standard *Miranda* warnings—"during interrogation." In addition, law enforcement officials often read the *Miranda* warnings off of a card prior to interrogation, so adding two words to the card would be extremely easy and not onerous.

One could argue that this proposed rule is already the rule of the Court, and that this proposal will not change existing law. This rule, however, differs from existing precedent in that it requires strict compliance with one of the *Miranda* warnings: the right to have counsel present during interrogation. Moreover, this rule is necessary in light of the fact that several circuits have not required law enforcement officials to make suspects aware of their right to have counsel present during interrogation,[181] a right that is guaranteed by the Fifth Amendment. The rule, therefore, augments the *Miranda* protections, or at least calls for the Court to reaffirm precedent that has not been followed.

It should be noted that adding "prior to" in addition to "during" questioning would certainly add an extra level of protection and would not further complicate the rule. However, a court adopting this bright-line rule need not go that far, as the *Miranda* warnings were intended to prevent against the evils that occur during interrogation, not before it.[182]

B. Benefits

The bright-line rule would benefit the entire criminal justice system. First, police officers would benefit from knowing exactly how they must advise the suspect of his Fifth Amendment right to counsel. Police do

179. *See* United States v. Contreras, 667 F.2d 976, 978 (11th Cir. 1982). Suspect was warned "you can have your attorney present while we interrogate you," and the court held this complied with *Miranda*. *Id.*

180. *See* California v. Prysock, 453 U.S. 355, 359 (1981); *Tucker*, 417 U.S. at 436.

181. *See supra* notes 65–68 and accompanying text.

182. *See supra* Part IV.A.

not want the statements they obtain during interrogation to be deemed inadmissible by a court based on inadequate warnings. Therefore, requiring police to alert the suspect of his right to have counsel present during interrogation, and not leaving what warnings are given up to officers' discretion, will help to ensure that the *Miranda* warnings are constitutionally adequate.

Second, suspects benefit because they are explicitly made aware of their right to have counsel present during interrogation, a right that is essential to the Fifth Amendment privilege against compelled self-incrimination. In addition, if the Supreme Court adopted the bright-line rule, its adoption would ensure that all criminal suspects across the country receive the same warnings: The rights that a suspect is made aware of should not depend on what state or part of the country he lives in.

Some critics of this proposal will argue that alerting a suspect of his right to have counsel present during interrogation will make the criminal justice system less efficient because more suspects will invoke their right to counsel, and as a result, fewer confessions will be obtained. However, this concern, while valid on its face, is unfounded in empirical evidence. A 1996 study from Salt Lake City, Utah, on the effects of the *Miranda* warnings discovered that 83.7% of suspects waive their *Miranda* rights and talk to the police during custodial interrogation.[183] Importantly, the warnings that were read to the suspects in this study included a warning that complies with the rule proposed in this Comment. The warning stated, "You have the right to talk to a lawyer and have him present with you while you are being questioned."[184] Only 7% of the suspects in this study invoked their right to counsel.[185] In a similar study on the effects of *Miranda* warnings conducted in the Berkeley, California, police department,[186] 78.3% of the suspects waived their *Miranda* rights.[187] This study did not indicate the precise warnings that were given, but the article explained that the interrogators read the *Miranda*

183. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859 (1996).

184. *Id.* at 888.

185. *Id.* at 860 tbl.3.

186. Leo, *supra* note 120, at 268. The author of this study did not reveal the location where the study took place. *Id.* However, later articles have revealed the location. *See, e.g.*, Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond* Miranda *in the New Millennium*, 34 J. MARSHALL L. REV. 637, 653 (2001).

187. Leo, *supra* note 120, at 276.

warnings "verbatim from a standard form."[188] The data from these studies suggests that adding "during interrogation" to the right to consult with an attorney will not result in substantially more, or even any more, suspects invoking their right to counsel.

Third, the bright-line rule will benefit judicial economy because fewer challenges will be brought based on the adequacy of the warnings, and the challenges that are brought will be quickly and easily decided. Without this bright-line rule, whether a court deems *Miranda* warnings constitutionally adequate in a given case is a fact-intensive inquiry. As stated by the Court in *Duckworth*, "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'"[189] The Court's declaration that this inquiry is a simple one was quite optimistic, and in reality has not been so simple. The court system will benefit from the rule because judges will not have to try to determine if the defendant was made aware of his right to have counsel present during interrogation through a warning that is a "fully effective equivalent" of the explicit warning, or if an ambiguous warning conveyed to the suspect his right to have counsel present during interrogation. With this rule in place, the inquiry will be a simple one: the warning either includes a temporal element alerting the suspect of his right to have counsel present during interrogation or it does not.

Oftentimes, the same court will find one warning adequate and another, almost identical warning inadequate based on small or even nonexistent differences, which exemplifies the present difficulty in determining whether warnings are adequate. For example, the Fourth District Court of Appeal of Florida reviewed two different *Miranda* warnings in two different cases that were almost identical, yet came to different conclusions.[190] In *Roberts v. State*, a police officer read the defendant his *Miranda* warnings, which included, "[Y]ou have the right to talk with a lawyer and have a lawyer present before any questioning."[191] The court held that this warning did not comply with *Miranda* because it did not inform the defendant of his right to have a lawyer present during interrogation.[192] The court went on to explain, "Florida courts have consistently interpreted *Miranda* as requiring

188. *Id.*

189. Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (alterations in original) (quoting California v. Prysock, 453 U.S. 355, 361 (1981)).

190. *See also supra* Part III.B.

191. 874 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 2004).

192. *Id.*

notification that a person in custody has a right to have counsel present not only before interrogation but *during* interrogation as well."[193]

Less than two years later, the same court heard a case en banc involving a very similar *Miranda* warning, and, in a 5–4 decision, reached the opposite conclusion it had reached in *Roberts*. In *Canete v. State*, the police officer told the defendant, "[Y]ou have the right to speak to an attorney, have an attorney present here before we make any questions."[194] After this warning, the police officer then told the defendant, "[i]f you decide to answer the questions now, without an attorney present, you still have the right not to answer my questions at any time until you can speak with an attorney."[195] The court recognized that the first warning did not alert the defendant that he had the right to have counsel present during interrogation, but interpreted the second warning to be the functional equivalent of that right.[196] According to the court, the defendant could infer from the totality of the warnings that he had the right to have counsel present during interrogation, and therefore the warnings complied with *Miranda*.[197]

Even assuming that the Fourth District Court of Appeal of Florida properly distinguished the two cases in a manner consistent with *Miranda* and the Fifth Amendment, this type of judicial hair-splitting is a waste of judicial resources, creates unclear precedent, and leads to inconsistent results, demonstrating the need for a bright-line rule. Under the rule proposed in this Comment, the warnings in both cases would be constitutionally inadequate because neither warning explicitly alerted the suspect of his right to have an attorney present during interrogation.

Adding this warning will not lead the Court down the "slippery slope" of having to continually add more warnings. The Supreme Court has already required this warning, and adding it would only reaffirm established precedent. Whereas adding, for example, "you have the right to remain silent during interrogation" has never been required by the Court and would be superfluous. Moreover, adding "during interrogation" to the right to the presence of an attorney warning is necessary because, as stated above, this right serves as the gatekeeper to

193. *Id.* at 1227.

194. 921 So. 2d 687, 688 (Fla. Dist. Ct. App. 2006) (en banc). The police officers gave the defendant his warnings in Spanish, and the warnings were translated into English in the opinion. *Id.* at 687.

195. *Id.* at 688.

196. *Id.*

197. *Id.* at 689.

the Fifth Amendment privilege against compelled self-incrimination.[198] Therefore, although adopting the bright-line rule could lead to requests for additional warnings, these requests could be easily dismissed on the grounds that the Court has never required the warnings, and that extra warnings are not necessary to protect the suspect's Fifth Amendment privilege.

VI. CONCLUSION

Unless a suspect is told that he has the right to have counsel present during interrogation, the suspect is not made aware of the full extent of the Fifth Amendment protections available to him. While confessions and statements made by a suspect during custodial interrogation are a vital part of the criminal justice system, the procedural safeguards that the *Miranda* warnings provide, specifically the right to have counsel present during interrogation, are necessary for the criminal justice system to maintain its legitimacy. The general warning that the suspect has the right to an attorney is ambiguous, as the right could attach at several different times, and thus a temporal element must be added to the warning—during interrogation. Moreover, if law enforcement officials give the extra warning, they will increase the likelihood that a confession will be deemed admissible without increasing the likelihood that a suspect will actually invoke his right to counsel, as most suspects waive their *Miranda* rights regardless of how the rights are presented. In light of the circuit split and *Davis*, which requires that a suspect make a clear and unambiguous request for counsel in order to properly invoke his right, the Court should clarify that the right-to-an-attorney warning must include the words "during interrogation," or a similar temporal element. The United States Supreme Court, as well as other courts that have not already done so, should require that a defendant be made aware of his right to have counsel present during interrogation, because to do otherwise promotes, or continues, a race to the bottom where police departments will create vague and misleading warnings to circumvent the *Miranda* protections.

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198. *See supra* notes 110–15 and accompanying text.

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